

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 64912-S41J BY SCHNEE,)
WAGGONER, BANDY ASSOCIATES)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision of July 11, 1988, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

FINAL ORDER


Application for Beneficial Water Use Permit No. 64912-s41J is hereby ordered denied and dismissed in its entirety.


CASE # 64912

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 24 day of August, 1988.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
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Helena, Montana 59620-2301
(406) 444 - 6605


Bob L. Larson, Hearing Examiner
Department of Natural Resources
and Conservation
P. O. Box 1828
Havre, Montana 59501
(406) 265 - 5516

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was duly served by mail upon all parties of record at their address or addresses this 25th day of August, 1988, as follows:

Schnee, Waggoner, Bandy Assoc.
1120 7th Avenue South
Great Falls, MT 59405-2247

Teague Ranches Inc.
ATTEN: Robert R. Teague
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White Sulphur Springs, MT
59645

MT Dept of Fish, Wildlife
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ATTN: Al Wipperman
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Great Falls, MT 59406

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Susan Howard
Hearing Reporter

CASE # 64912

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 64912-S41J BY SCHNEE,)
WAGGONER, BANDY ASSOCIATES)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 24, 1988 in Great Falls, Montana.

Clinton Schnee, A.P. Waggoner, and Vernon G. Bandy, the Applicants in this matter, appeared at the hearing in person and were not represented by counsel.

Objector Teague Ranches, Inc. was represented at this hearing by Robert Teague and Kenneth Teague in person and was not represented by counsel.

Objector Montana Department of Fish, Wildlife, and Parks was not present at this hearing but notified the Hearing Examiner by letter of May 17, 1988 that they would not appear and present testimony provided the Hearing Examiner accepted the agreed upon conditions between the Applicants and the Department of Fish, Wildlife, and Parks. By letter of May 18, 1988, the Hearing Examiner notified all parties of record that the stipulated conditions were acceptable for the purposes of a proposed decision provided all the criteria for issuance of a permit are satisfied.

CASE # 64812

Sterling Sundheim, Civil Engineer Specialist III of the Lewistown Water Rights Field Office, appeared as staff witness for the Montana Department of Natural Resources and Conservation (hereafter, the "Department").

EXHIBITS

The Applicants did not offer exhibits for inclusion in the record in this matter.

Objector Teague Ranches, Inc. offered the following exhibit for admission into record.

Objector's Exhibit No. 1 consists of a letter and inspection results dated February 11, 1988 from J. Arrigo of the Department of Health and Environmental Sciences to Bob Teague informing Mr. Teague of the inspection water sample results from Meadow Creek Spring, White House Spring, Fox Desert Spring, Atlanta Creek at U.S.F.S. boundary, and Atlanta Creek at U.S.F.S. Gage Station.

The Applicants objected to the admission of this document because they had no way of knowing of its accuracy, they could not cross-examine its author, and because it failed to establish the evidentiary foundation necessary to enable the author to render an expert opinion on water quality, sampling and testing procedures.

Absent the evidentiary foundation in this case, the Hearing Examiner will not rely on any opinions or recommendations expressed in the Objector's Exhibit No. 1. However, the Hearing Examiner will take notice of the fact that water samples were taken and analyzed by an inspector for the Water Quality Bureau, Department of Health and Environmental Sciences, for the purpose of establishing a baseline water quality sampling.

The field inspection report is admissible under the standard herein.¹ Section 85-2-121 MCA (1985); Rule 36.12.221(1) A.R.M. ". . . the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. . . ." The sampling, testing, and test results obtained from an impartial state agency specialized and trained in water quality analysis and in this case the Department of Health and Environmental Sciences would normally be considered accurate by reasonably prudent persons. The Hearing Examiner hereby affirms the admission into evidence of Objector's Exhibit No. 1.

¹See also, Rule 803 (15) MRE (1983) (Hearsay exceptions: Availability of declarant immaterial.)

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in Section 85-2-306 do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 64912-s41J was duly filed with the Department of Natural Resources and Conservation on August 19, 1987 at 10:42 A.M.

3. The pertinent portions of the Application were published in the Meagher County News, a newspaper of general circulation in the area of the source on December 3, 1987. The Notice of Application set December 18, 1987 as the deadline for filing objections to the application.

4. On December 17, 1987, an objection to the granting of the application was filed with the Department by the Montana Department of Fish, Wildlife and Parks. The Department of Fish, Wildlife and Parks claim instream water rights for the purposes of preserving fish and wildlife habitat in the Smith River for the following amounts:

<u>Time Period</u>	<u>Flow Rate (cfs)</u>	<u>Acre-feet/Year</u>
July 1 - April 30	90	54,255
May 1 - June 30	150	18,144

The Montana Department of Fish, Wildlife and Parks would agree to the issuance of this permit provided it is subject to the agreed upon conditions signed by the Applicants on March 23, 1988. (See Department File.)

5. On December 17, 1987, an objection to the granting of the application was filed with the Department by Teague Ranches, Inc. Teague Ranches, Inc. claim decreed stock and irrigation water rights downstream on Atlanta Creek and Camas Creek. Teague Ranches, Inc. claim there are no unappropriated waters in Atlanta Creek, that surface water depletions from Atlanta Creek would adversely affect their downstream rights because of evaporation losses and delayed underground recharge from seepage to the creek, and that the past history of mining operations on Atlanta Creek have resulted in excessive amounts of arsenic, causing severe problems with stockwater and agriculture. (See Department File, Testimony of Bob Teague.)

6. The source of water for the proposed appropriation is surface water from Atlanta Creek, a tributary to Camas Creek, which is a tributary to the Smith River. The point of diversion is transitory on Atlanta Creek between the NE1/4 SW1/4 of Section 5 and the SE1/4 NE1/4 SE1/4 of Section 4, both in Township 9 North, Range 4 East, M.P.M., Meagher County, Montana. The Applicants propose to appropriate water in order to facilitate placer mining on four mining claims located in the upper reaches of Atlanta Creek. The four claims which the Applicants intend to mine are named Abby, Phyllis, Mike, and Mark. (See Department File.)

7. The Applicants originally requested 150 gallons per minute (gpm) up to 24.9 acre-feet per year for placer mining to be diverted from Atlanta Creek between April 15 to October 15 by means of a 5.0 horsepower pump. The Applicants decided to amend the period of use to conform to the time period when the U.S. Forest Service will allow motorized vehicles into the area, i.e. May 15 to October 15. The Applicants further testified that the full 150 gpm was not necessary and that the pump could be idled down to supply a lesser flow rate as low as one miners inch (11.22 gpm) and still provide a feasible placer mining operation with existing equipment. The Applicants explained that their period of use would conform to the pattern described in the original permit application, eight hours a day, five days a week. Since the period of use was amended downward

and the flow rate testified to as necessary for the beneficial use of water with existing equipment at 11.22 gpm, the volume must be reduced accordingly. It is impossible to pump 24.9 acre-feet by pumping 11.22 gpm eight hours a day five days a week within the specified period of use.

11.22 gpm for 60 minutes = 673.2 gallons per hour

8 hours for 110 days = 880 hours of pumping

so

$880 \times 673.2 = 592,416$ gallons per year

and

$592,416 \div 325,851$ (gallons/ac-ft) = 1.82 acre-feet per year.

Hence, the Applicants' reduction in period of use and beneficial use flow rate have reduced the total volume to 1.82 acre-feet per year.

8. Water will overflow from the 15 inch sluice box mounted on a one-half ton 4 x 4 truck into an unlined settling pond located within 100 feet of the creek. (Testimony of Applicants.) Eventually the settling pond will fill up with waste sediment (i.e. ore, dirt, and rock). When this occurs, the Applicants plan to dig another new sediment pond downstream. The Applicants propose to use only one pond at a time, although several ponds will be needed to complete the mining process in the creek area.

9. The Applicants testified that settling pond water will percolate back into the ground fairly rapidly and that evaporation losses would be minimal. Settling pond water could return to the creek by seepage and infiltration through the limestone formation or when water overflows the walls of the settling pond. However, the Applicants testified that it was not their intent to allow unsettled surface overflows of the settling pond to directly discharge into Atlanta Creek. No evidence was presented regarding the amount of time it will take for any of the pond water to return to the creek as surface flow.

10. The Applicants testified that PH readings of the settling pond water would be taken at regular intervals to monitor any changes in its acidity and alkalinity. The Applicants further testified that it was highly unlikely that arsenic would readily dissolve in water and cause animal or crop losses. However, the Applicants testified that concentrations of sulfuric acid or hydrofluoric acid may have contributed to cattle and crop losses downstream in the past.

11. Teague Ranches, Inc. flood and sprinkler irrigate several hundred acres of land from Atlanta Creek and Camas Creek downstream from the Applicants' point of diversion. Teague Ranches, Inc.'s water rights are decreed water rights under Case No. 3117, Camas Creek and Tributaries, Meagher County, Montana. Senate Bill 76 claims have been filed for each right. Teague Ranches, Inc. have eight (8) filed water

rights on Atlanta Creek and seven (7) filed water rights on Camas Creek totaling over 1,540 miners inches of water for irrigation and stockwater purposes. Their closest point of diversion on Atlanta Creek, for a decreed water right of 315 miners inches, lies approximately 3/4 of one mile downstream from the Applicants' proposed placer mining operation.

(Testimony of Objector Bob Teague, Department File.) Bob Teague further testified that their period of use for irrigation runs from May 1 through October 1 continuously and that there are no unappropriated waters in Atlanta Creek.

Kenneth Teague testified that once the water leaves Atlanta Creek from their point of diversion, it never returns to the source. Kenneth Teague further testified that only once did their diversion on Atlanta Creek wash out and that was due to a major flood event.

12. Objector Bob Teague testified that even small diversions from Atlanta Creek would adversely affect their water rights downstream and that evaporation losses would be severe from the placer mining settling ponds. In this regard, the Applicants and Objector Bob Teague presented conflicting evidence and testimony as to major losses from evaporation and adverse affect from the placer mining diversions. Bob Teague further testified that during low flow periods such as they are currently experiencing, the water in Atlanta Creek is fed to their gravity sprinkler irrigation system which supplies nine (9) uncontrolled

sprinklers at 30 gpm or twenty-one (21) controlled sprinklers to more effectively use the available water.

13. There are water shortage problems in the drainage basin. Objector Bob Teague testified that when shortages get severe, a water commissioner is appointed by the District Court to monitor and apportion diversions from the creek in accordance with the Camas Creek and Tributaries Decree.

14. Department records indicate that there are other claimed water uses downstream from the Applicants' point of diversion. No Provisional Permits have been issued on Atlanta Creek by the Department. (See Department File.) Other than the Montana Department of Fish, Wildlife and Parks and Teague Ranches, Inc., no other appropriator pursued an objection to the Application.

15. Department records do not disclose other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicants prove by substantial credible evidence that the following MCA, Section 85-2-311 criteria are met:

- a. there are unappropriated waters in the source of supply:
 - i. at times when the water can be put to the use proposed by the applicant;
 - ii. in the amount the applicant seeks to appropriate; and
 - iii. throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- b. the water rights of a prior appropriator will not be adversely affected;
- c. the proposed means of diversion, construction, and operation of the appropriation works are adequate;

- d. the proposed use of water is a beneficial use;
- e. the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The Applicants have a bona fide intent to appropriate only 11.22 gpm up to 1.82 acre-feet per year. While the Application sought 150 gpm up to 24.9 acre-feet per year, the testimony of the Applicants herein reflect that the additional quantity requested was premised on a hope or belief of increased production at some future point. This is not in accord with the fixed and definite plan for the use of water that is the hallmark of an initiation of an appropriation. See Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900). See MCA 85-2-312(1) (1985). The intent of the appropriator further refines the parameters of the right. That is, the use and need for the water must be certain, i.e. not speculative, and the intent must encompass the entire use for the priority date to relate back to first use. Power v. Switzer 21 Mont. 523 (1898), In the Matter of the Application for Beneficial Water Use Permit No. 28224-s401 by Robert H. Loomis and Clark H. and Opal Edenfield. Final Order July 19, 1982. The volumetric amount reflected in the Application in this matter has therefore been reduced proportionately to track with Applicants' present intentions

as to the flow rate required for their purposes. (See Finding of Fact 7.)

5. The use of 11.22 gpm up to 1.82 acre-feet per year would be of material benefit to the Applicants, as the use of water is integral to the placer mining operation the Applicants are engaged in. Such a use of water as mining is within the legislative definition of "beneficial use". See MCA 85-2-102(2) (1985).

6. The Applicants' proposed means of diversion, construction, and operation of their proposed appropriation works are adequate. The Applicants' proposed means of conveying the water to their place of use are customary for their intended purposes, and will not result in the waste of the water resource. (See Findings of Fact 7 and 8.)

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Findings of Fact 14 and 15.)

8. The Applicants did not prove by substantial credible evidence that there are unappropriated waters in Atlanta Creek at times when the water can be put to beneficial use; in the amount proposed for the appropriation; and throughout the period during the proposed appropriation, the amount requested is available. The Applicants further did not prove by substantial credible evidence that the rights of a prior appropriator will not be adversely affected.

The waters of Atlanta Creek have a history of conflict and water shortages and appear to only sporadically exceed the diversion requirements of Teague Ranches, Inc., if at all. (See Findings of Fact 11 and 13.)

By taking waters from the surface source of supply and placing the same in settling ponds, the Applicants will necessarily affect the flow regime of Atlanta Creek. The timing effect on this record can only be regarded as conjectural. (See Finding of Fact 9.) While the Applicants' settling ponds appear to be highly permeable when they are scraped to bedrock, the amount of time required for the water to permeate through the settling ponds does not of itself establish the period of time these waters require to ultimately recharge the Atlanta Creek flow. It is plain that the Applicants believe that the waters discharging from the settling ponds proceed directly to the stream, and as the distance involved is very minor, they presume that the time lag is truly insignificant. However groundwater movement is always measured in terms of feet per day or feet per year which lays a basis for a potentially marked disparity in water flows in Atlanta Creek between the time of diversion and the time of recharge. These differentials in rate of flow will inevitably cause fluctuations in the amounts of water in

Atlanta Creek at any given time. The Hearing Examiner is willing to indulge in the belief that the waters escaping from the settling ponds will in fact return to the source of supply, but it cannot be said that the fluctuations of flow attendant thereto will not result in adverse affect to the uses of Teague Ranches, Inc.

The significance of this temporal lag lies within two parameters. In high flow seasons, the lagging return flows may deprive a relatively senior appropriator of his historic flood water right by leaving him out of priority as to the waters eventually accruing to the source of supply by Applicants' returns. In low water seasons, the alternations in Atlanta Creek flow created by this lagging effect may significantly handicap a downstream irrigator in regulating his diversion works so that he may reasonably apply the full measure of his appropriation to his intended use.

It is true that the Applicants' use will not divert or consume a significant amount of water. However, a prior appropriator is not limited in his rights simply to the total quantity required for his purposes. Rather, a prior appropriator is entitled to insist that an amount of water remain in the source of supply such that he may reasonably exercise his right to divert the quantity required for beneficial use. It is the use of water that is protected, and not merely the quantity of water in the aggregate required for the particular appropriator's purpose.

Thus, the prior appropriator is entitled to sufficient carriage water to deliver the claimed flow to his headgate. See Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940), State ex. rel. Crowley, supra.

The evidence herein demonstrates that Teague Ranches, Inc. is in need of a significant head of water merely to carry the waters ultimately required for beneficial use to their place of use. See generally Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922). The Applicants' evidence is insufficient to show that the Objector Teague Ranches, Inc. does not need water to the full capacity of its diversion works in this regard, nor does the evidence otherwise indicate that Teague Ranches, Inc. is wasting water.

Therefore, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 64912-s41J is hereby ordered denied and dismissed in its entirety.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing

Examiner (P.O. Box 1828, Havre, MT 59501); the exceptions must be filed within twenty (20) days after the proposal is served upon the party. MCA Section 2-4-623.

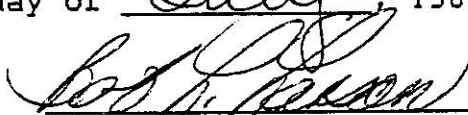
Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within twenty (20) days after service of the proposal upon the party. MCA Section 2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Done this 11st day of July, 1988.



Bob L. Larson, Hearing Examiner
Department of Natural Resources
and Conservation
P. O. Box 1828
Havre, MT 59501
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CASE # 64812

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 12th day of July, 1988, as follows:

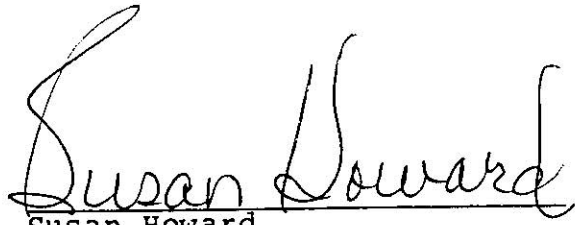
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